E COPY

FILED
JAN 15 1954
HAROLD B. WILLEY, Cle

Supreme Court of the United States

OCTOBER TERM, 1953

Nos. 433-434

DAVID RINES, ADMINISTRATOR OF THE ESTATE OF LUCY L. RINES,

Appellant,

v.

THE HONORABLE JUSTICES OF THE SUPERIOR COURT

APPEALS FROM THE SUPREME COURT OF THE COMMONWEALTH OF MASSACHUSETTS

PETITION FOR REHEARING OR RECONSIDERATION

DAVID RINES,
RINES AND RINES,
Attorneys for the Appellant,
No. Ten Post Office Square,
Boston 9, Massachusetts.

Supreme Court of the United States

OCTOBER TERM, 1953

Nos. 433-434

DAVID RINES, ADMINISTRATOR OF THE ESTATE OF LUCY L. RINES,

Appellant,

v.

THE HONORABLE JUSTICES OF THE SUPERIOR COURT

APPEALS FROM THE SUPREME COURT OF THE COMMONWEALTH OF MASSACHUSETTS

PETITION FOR REHEARING OR RECONSIDERATION

The appellant respectfully requests rehearing or reconsideration of this Court's dismissal of his appeals in the two suits, Nos. 433 and 434.

Those dismissals constitute a holding by this Court, for the first time in its long history, that a citizen of these United States may be deprived, by legislation of one of the States, of his right to trial by jury.

Chapter 231, section 127, General Laws of the Commonwealth of Massachusetts, Tercentenary Edition, empowers a judge of the Superior Court to set aside a jury's verdict and order a new trial, "at any time before judgment,"

even long after that judge has completely lost jurisdiction over the suit.

Three and one-half years after the final termination of the appellant's suits in the Superior Court (p. 4 of the Statement as to Jurisdiction), accordingly, a judge ordered new trials in those suits. He could not, of course, order the new trials without a hearing of some sort. He determined, however, being biased and prejudiced, as admitted by the pleadings, that the appellant should not be present at that hearing. He therefore conducted that hearing in secret, in a locked private room of the court house, from which the public was excluded. He conducted that secret hearing, furthermore, without notice to the appellant. He took deliberate steps, indeed, to make certain that the appellant should not learn of that secret hearing until after it was over; this was because an earlier attempt to conduct the hearing in secret had failed.* The judge refused to receive any evidence from, or hear any argument of, the appellant that might tend, in any way, to change the preconceived notions that, upon suspicion merely, and without evidence, had entered his biased and prejudiced mind.

The Supreme Judicial Court of the Commonwealth knows full well that the said state statute, under the provisions of which the new trials were ordered, has deprived the appellant of due process; else that Court would have affirmed the decision of the single justice (see pp. 5 and 6 of the said Statement As To Jurisdiction). The only reason that the Supreme Judicial Court has denied relief to the appellant is that, in its opinion, the appellant should have tested the constitutionality of the statute, not by way

*The details are given more fully on pp. 14 to 17 of the Appellant's Motion To Supplement The Record and Memorandum, on file in this Court in each of the two suits, Nos. 433 and 434.

of certiorari or mandamus, but rather by bill of exceptions, under the provisions of another state statute, Chapter 231, section 113 of the said General Laws.

This holding of the Supreme Judicial Court was directly contrary, however, to a previous holding, made summarily, without hearing, by the same Supreme Judicial Court, to the effect that a bill of exceptions was *not* the "proper" remedy for testing the jurisdiction of the Superior Court to issue the orders for new trial (p. 7 of the Statement As To Jurisdiction.)

The appellant has therefore been deprived of his vested rights in the jury's verdicts without even being afforded a hearing:

First, in the Superior Court;

Secondly, in the Supreme Judicial Court;

and now, since his appeals have been dismissed,

Thirdly, in this Court, also.

The dismissal of the appeals may have been influenced by the holding of the Supreme Judicial Court (at the bottom of p. 17 and the top of p. 18 of the Statement As To Jurisdiction) to the effect that the appellant still has a remedy by proceeding with the ordered new trials. The fact is, however, that the new trials cannot afford the appellant any remedy whatever, irrespective of the outcome of the new trials.

If the new trials should result in new verdicts of the jury in the appellant's favor, those new verdicts would be assailable by the defendants as absolutely void, because the

orders for new trial are themselves absolutely void. Notwithstanding the state statute, Chapter 231, section 127, the Superior Court possessed no more jurisdiction to order those new trials than was possessed by the man who runs the elevator in the court-house building. If, on the other hand, the appellant should fail in his suits on the new trials, he would still have no means for testing either the validity of the Superior Court's orders for the new trials or the constitutionality of the state statute under the provisions of which the orders for new trial were issued. The suggestion of the Supreme Judicial Court that the remedy lies in a bill of exceptions, as before explained, is without basis, because the appellant has already invoked that remedy, and he has been informed, by both the Superior Court and the Supreme Judicial Court that that is not a "proper" remedy.

In the opinion of legal commentators, this Court has traveled a long way since it first enunciated the doctrine of the "insubstantial federal question," in *Zucht* v. *King*, 260 U.S. 174, 176-177. Attention is invited to Appendix A.

The appellant therefore prays that this Court grant rehearing or reconsideration in the said suits, Nos. 433 and 434; further, that it note jurisdiction of the appeals in the said two suits; and also that the appellant be afforded an opportunity to brief and argue the merits of the substantial questions of law presented by the said appeals.

Respectfully submitted,

DAVID RINES,
No. Ten Post Office Square,
Boston 9, Massachusetts,
Counsel for Appellant.

RINES AND RINES,
of Counsel.

CERTIFICATE.

I hereby certify that the foregoing petition is presented in good faith, and not for the purposes of delay, and that it is well founded in fact and law.

DAVID RINES,
No. Ten Post Office Square,
Boston 9, Massachusetts,
Counsel for Appellant.

Service of a copy of the foreging Petition for Rehearing or Reconsideration is acknowledged this day of January, 1954.

.....

Assistant Attorney General,
Attorney for the Appellees.

APPENDIX A.

A number of legal papers have expressed the opinion that this Court is not complying with the will of Congress that it take obligatory jurisdiction of appeals. Perhaps as illustrative as any is the following statement, by Professor John P. Frank, "The United States Supreme Court: 1950-1951," The University of Chicago Law Review, vol. 19, No. 2, p. 165, at p. 231:

> If the Court treats truly arguable questions as "insubstantial," or if it summarily affirms appeals, it has for all practicable purposes obliterated the very difference between certiorari and appeals which Congress meant to preserve. The Court has for some years been in the process of interpreting away the difference between appeals and certiorari, reducing the appeals also to a matter of its own discretion; and it seems probable that within a few years there will be little practical difference between the two methods of review.

The bar recognizes the fact, of course, that this Court cannot possibly handle all the cases that come before it. One solution to this part of the problem is proposed at the close of an article on "The Insubstantial Federal Question," 62 Harvard Law Review, 1948-1949, p. 488, at p. 496. That proposed solution is that the Court seek to lighten its mandatory appellate jursidiction by seeking relief from Congress. Since the Court has not looked with favor on this proposal, however, it would appear that it is quite willing to continue to carry the load that Congress has prescribed. Under the circumstances, it is believed that the appellant ought to be accorded the kind of hearing, on his appeals, that Congress, apparently with the full approval of this Court, has provided for.